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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN MICHAEL CASTRO,

Defendant and Appellant.

C091245

(Super. Ct. No. 62-163137)

A jury convicted defendant Steven Michael Castro of committing a lewd act upon I., a five-year-old girl (Pen. Code, § 288, subd. (a)),¹ and possessing child pornography (§ 311.11, subd. (a)). It also found true an allegation that the possession of child pornography involved multiple images. (§ 311.11, subd. (c)(1)). The trial court sentenced defendant to an aggregate prison term of six years eight months.

¹ Undesignated statutory references are to the Penal Code.

Defendant now contends (1) there was insufficient evidence to support his conviction for committing a lewd act, (2) evidence of I.'s extra-judicial statements should not have been admitted, and (3) the trial court should not have instructed the jury that it could use I.'s extra-judicial statements to evaluate defendant's subsequent conduct.

We conclude (1) substantial evidence supports the lewd act conviction, (2) some of defendant's evidentiary challenges are forfeited and he fails to establish abuse of discretion, and (3) defendant did not preserve his instructional error claim and any error did not affect his substantial rights.

We will affirm the judgment.

BACKGROUND

Anna and her partner Christina lived with their daughters, I. and J. Defendant is Christina's cousin. Defendant moved in with Anna and Christina in February 2018. I. was five years old and J. was two years old at that time.

Defendant spent a lot of time with the girls. He played with both of them but paid more attention to I. He bought I. toys and clothes, and they spent time in his bedroom watching television. He snuggled on the couch with I. under the same blanket and continued to do so even after Anna asked him not to.

I.'s conduct changed after defendant moved in. She was angry. She urinated and defecated on herself and was scared to sleep in her bedroom. She became irritated with defendant and wanted to play with him less. There were also changes in J.'s behavior.

When I.'s grandmother Mary was teaching her grandchildren about when it was not okay for someone to touch them, I. told her grandmother that "DoDo" touched her. "Dodo" was defendant's nickname. When Mary asked I. where defendant had touched her, I. said "Right here and right here, with my pants on," pointing to her vagina and her bottom.

Mary did not ask I. about any touching after that, and she did not immediately tell Anna and Christina. Mary did not have a good relationship with her daughter Christina.

But weeks later, Mary wrote an anonymous letter addressed to defendant stating, “We know what’s going on. Just move out.” The letter had a post-mark date of April 9, 2018. Mary wrote the letter anonymously because she did not think anyone would believe her and she was afraid something worse could happen to I.

Defendant showed the letter to Anna and Christina when he received it and said that maybe he should move out. Anna and Christina did not know what the letter was about. They did not ask defendant to move out and defendant continued living with them.

Anna and Christina asked Mary if she wrote the anonymous letter. Mary said she did not.

Sometime between June and August, after he received the anonymous letter, defendant told Anna, while he was intoxicated, that voices in his head were telling him to do stuff to the girls, he did not want to do those things, it was hurting him inside and he was trying not to do anything. Anna did not know what defendant meant.

Defendant’s mother, Anna’s male cousins and others were at Anna and Christina’s house in October 2018. It was I.’s birthday. Defendant was intoxicated. When Anna and defendant’s mother were giving I. a bath, defendant pushed his mother out of the bathroom. He said I. was his. He told his mother to stay away from I. He acted jealous and tried to pick I. up when I. played with Anna’s male cousins. Anna called the police because defendant’s behavior was concerning to her, and the police took defendant away.

Anna found a USB flash drive hidden between folded clothes in defendant’s closet when she went into defendant’s locked bedroom to get clothes for him. She opened a folder titled “Mmmmm” on the flash drive and saw videos and pictures of children being molested. Anna did not see any videos or images of her daughters. Anna called 911 and turned over the USB flash drive and an ASUS laptop and CyberPower computer from defendant’s bedroom to law enforcement officials.

After Christina saw the images on the USB flash drive, she asked Mary again about the anonymous letter. Mary admitted writing the letter.

Evidence was presented at trial of child pornography images and videos found on the USB flash drive, on the CyberPower computer, on the ASUS laptop, and on defendant's cell phone.

There were photographs of I. and/or J. on the laptop. Some of the photographs were shown to the jury. Placer County District Attorney's Office investigator Christina Woo testified that in some photographs, I. posed in the same manner as subjects in the child pornography images found in this case.

I. did not make any disclosure about defendant during her Multi-Disciplinary Interview Center (MDIC) forensic interview.

Detective Adrian Coghlan interviewed defendant after advising him of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]. An audio-recording of that interview was played at trial. Defendant admitted he kept pornography on the flash drive. He said I. liked to jump on him and get on his shoulders, and he got an erection when they wrestled but he knew when to stop. He said that happened a handful of times. He said the girls probably detected his arousal, but he could separate himself from the girls even after he got an erection. Defendant said he felt guilty for feeling aroused; that's why he needed child pornography to make himself feel better. Defendant admitted he was attracted to girls as young as four years old and started having sexual thoughts about young girls when he was in his 20s. He said he had gotten "turned on" when he was on the couch with the girls and got aroused when he saw I and J. naked. But defendant denied doing anything to I. and J. He denied touching the girls' vaginas. When asked if he ever did something that could be construed as touching the girls' vaginas, defendant said they wrestled and played around and maybe he "brushed up against something" unintentionally while playing around or wrestling. He denied ever

intentionally touching the girls. He denied wrestling with the girls because he wanted to get aroused. He said he had certain desires but did not act on those desires.

The jury convicted defendant on a count one charge of committing a lewd act upon I. (§ 288, subd. (a)) and a count three charge of possessing child pornography (§ 311.11, subd. (a)). It found true an allegation in count three that the crime involved multiple images. The jury could not reach a verdict on the count two charge of committing a lewd act upon J. and the trial court declared a mistrial as to that count. Count two was later dismissed.

DISCUSSION

I

Defendant challenges the sufficiency of the evidence establishing his count one conviction for committing a lewd act upon I. He contends that no inherently lewd contact with I. was proved and there was insufficient evidence to establish that he acted with the requisite intent.

Defendant was charged in count one with violating section 288, subdivision (a). The elements of the crime include (1) the willful commission of a lewd or lascivious act (2) upon or with the body, or any part thereof, of a child under 14 years of age (3) with the intent of arousing, appealing to or gratifying the lust, passions or sexual desires of the defendant or the child. (§ 288, subd. (a); *People v. Memro* (1985) 38 Cal.3d 658, 697, overruled on another ground by *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) A touching of any part of the victim's body satisfies the first element, even if the touching is outwardly innocuous and inoffensive, as long as the defendant harbored the requisite lewd intent. (*People v. Shockley* (2013) 58 Cal.4th 400, 404; *People v. Lopez* (1998) 19 Cal.4th 282, 289, 291; *People v. Martinez* (1995) 11 Cal.4th 434, 442-445, 450, 452.) The touching need not occur in an inherently lewd manner. (*Martinez*, at p. 442.)

In determining whether sufficient evidence supports a conviction, “ ‘we do not determine the facts ourselves. Rather, we “examine the whole record in the light most

favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.]’ ” (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) We do not reweigh evidence. (*Ibid.*) “ ‘Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.’ [Citation.] Unless it describes facts or events that are physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. [Citation.]” (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) The above standard of review also applies to insufficient evidence claims involving circumstantial evidence. (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) “ ‘We “must accept logical inferences that the jury might have drawn from the circumstantial evidence.” ’ ” (*Ibid.*) The effect of this standard of review is that a defendant challenging the sufficiency of the evidence to support his or her conviction bears a heavy burden on appeal. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.)

Applying the above principles, we conclude the evidence supports the lewd act conviction. I. was five years old at the time of the charged offense. With regard to the elements of willful touching and the requisite intent, defendant admitted a longstanding and continuing sexual interest in girls as young as four years old, and said he got turned on when he was cuddling on the couch with I., something Anna and Christina testified defendant often did. Defendant also admitted he got an erection and that he was actually aroused when he wrestled with I., something Anna testified defendant did with I. about

four times a week. The jury was entitled to reject defendant's denials that he touched I.'s vagina or that he touched I. and J. to get aroused. (*People v. Wilson* (2020) 56 Cal.App.5th 128, 155.) Defendant admitted he felt guilty for feeling aroused and he needed child pornography to alleviate his desire. He possessed hundreds of images of child pornography. The child pornography was probative of his intent to commit a lewd act upon I. (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1100, 1102; *People v. Avila* (2014) 59 Cal.4th 496, 499, 503, 518-519; *People v. Memro* (1995) 11 Cal.4th 786, 864-865, abrogated on a different ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 638-639 & fn. 18; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 396, 404-405.) Defendant also had a photograph of I. posed in a manner similar to the girls in some of the pornographic images found on the USB flash drive. The evidence is sufficient to support defendant's conviction for committing a lewd act upon I.

II

Defendant next contends the trial court erred in admitting the extra-judicial statements that I. made to her grandmother Mary.

The People sought to admit I.'s extra-judicial statement to Mary under the spontaneous statement hearsay exception (Evidence Code section 1240) and as a "fresh complaint." The prosecutor said she would not call I. and J. as trial witnesses because the girls may not qualify as competent witnesses. The prosecutor offered to prove that in response to Mary's routine discussion about inappropriate touching, five-year-old I. said defendant had touched her and pointed to where he had touched her.

The prosecutor said I.'s statements to Mary would not be offered for the truth of the matter asserted but would be admissible to help the jury understand how the investigation began, to show Mary's state of mind in writing the anonymous letter, to show the state of mind of I.'s parents when they contacted law enforcement, and to assess defendant's statements and intent after he received the anonymous letter. Defendant objected to the proffered evidence on the grounds that it was hearsay, that it was a

testimonial statement inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 [158 L.Ed.2d 177], that it lacked relevance, that it was unduly prejudicial under Evidence Code section 352, and that I. did not corroborate Mary's claim about I.'s extra-judicial statements.

The trial court ruled that I.'s statements to Mary did not qualify as a spontaneous statement but were admissible under the "fresh complaint" doctrine and Evidence Code section 352. It ruled that the statements had significant probative value for the nonhearsay purposes of establishing the circumstances surrounding the delayed disclosure and were also relevant to why Mary wrote the accusatory letter to defendant, defendant's intent and claim of accidental touching, and defendant's interrogation statements. The trial court said it would give a limiting instruction and defendant could introduce evidence of the nondisclosure at the MDIC interview. The trial court rejected defendant's confrontation clause claim.

Defendant now argues I.'s extra-judicial statements to Mary (1) contained details inadmissible under the "fresh complaint" doctrine, (2) were admitted for an improper purpose, and (3) should have been excluded under Evidence Code section 352.

Defendant forfeited the first two claims because he did not object in the trial court on those grounds. (Evid. Code, § 353, subd. (a); *People v. Seijas* (2005) 36 Cal.4th 291, 302.)

As for his Evidence Code section 352 contention, under that section a trial court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Sully* (1991) 53 Cal.3d 1195, 1220.) We review the trial court's ruling as to the admissibility of evidence, including under Evidence Code section 352, for abuse of discretion. (*People v. Jones* (2017) 3 Cal.5th 583, 609; *People v. Jimenez* (2019) 35 Cal.App.5th 373, 389.) Under that standard, we examine the record in the light most

favorable to the trial court's decision. (*People v. Edwards* (2013) 57 Cal.4th 658, 711.) We will not disturb the trial court's decision except on a showing that it exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124.) We also consider only what was before the trial court at the time it ruled. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1007, fn. 23; *People v. Hernandez* (1999) 71 Cal.App.4th 417, 425.)

The California Supreme Court has acknowledged that the premise underlying the common law fresh complaint doctrine -- i.e., that it is natural for a victim to promptly disclose a sexual offense -- has largely been discredited. (*People v. Brown* (1994) 8 Cal.4th 746, 759-760 (*Brown*).) However, "under principles generally applicable to the determination of evidentiary relevance and admissibility, proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose -- namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others -- whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred" so long as its probative value outweighs its prejudicial effect. (*Id.* at pp. 749-750, see *id.* at pp. 759-760, 763.) Extra-judicial complaint evidence is admissible for the limited purpose of establishing that the victim made a complaint and the circumstances under which the complaint was made and to rebut any inferences that might be drawn from failure to complain. (*Id.* at pp. 750, 759-761, 763-764; *People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1522 (*Ramirez*).) The evidence is not admitted for the truth of the matter asserted. (*Brown*, at pp. 755, 763.)

During his interview with Detective Coghlan, defendant denied touching I.'s vagina. At the hearing on the in limine motions, defendant's trial counsel noted there was no corroboration for Mary's assertion that I. made extra-judicial statements about

inappropriate touching. It appeared defendant might argue that I. did not complain about molestation by defendant and, therefore, that the charged crime did not occur. In that context, the trial court did not err in concluding that the proffered evidence was probative of whether I. disclosed the commission of the charged crime and that the evidence of the fact and circumstances of I.'s complaint might be relevant to the jury's evaluation of the likelihood that the charged offense did or did not occur. (*Brown, supra*, 8 Cal.4th at pp. 749-750, 761-762.)

The trial court recognized in its Evidence Code section 352 analysis that there was a risk the jury would consider I.'s statements for the truth of the matter asserted, but the trial court said it would give the jury a limiting instruction and defendant could counter any prejudicial inference by introducing evidence that I. did not disclose any molestation by defendant during her MDIC interview. A limiting instruction was given and the nondisclosure evidence was introduced at trial. The trial court admonished the jury that it may not consider I.'s extra-judicial statements for the truth. Additionally, I.'s extra-judicial statements were not detailed and were not more prejudicial than defendant's own admissions of being "turned on" and having an erection from cuddling and wrestling with I. yet continuing to do so, and getting aroused when he saw I. and J. naked. Further, defendant does not contend that the trial court erred in concluding that admission of evidence about I.'s statements would not necessitate undue consumption of time, confuse the issues, or mislead the jury. Defendant fails to demonstrate error by the trial court.

III

Defendant further contends the trial court erred in instructing the jury that it could use I.'s statements to Mary to evaluate defendant's conduct upon receipt of Mary's letter, and to also evaluate his interrogation responses regarding receipt of the letter and allegations of touching.

The trial court instructed the jury that I.'s statements to Mary were not admitted for the truth and if the jury concluded I. made the statements, they could be considered

only for the following purposes: “No. 1, to give you all the pertinent facts about whether or not a disclosure was made by [I.]. Although, you cannot consider the statement as evidence that the touching actually occurred, the fact of a disclosure can be considered along with other evidence of nondisclosure by [I.]. [¶] No. 2, to explain the conduct of [Mary] in writing the letter. And you may also consider the Defendant’s conduct upon receiving the letter. [¶] And No. 3, to provide context regarding the Defendant’s statements during his interview with law enforcement regarding receiving the letter and the allegations of touching.”

As we have explained, extra-judicial complaint evidence is admissible for the limited purpose of establishing that the victim made a complaint and the circumstances under which the complaint was made and to rebut any inferences that might be drawn from failure to complain. (*Brown, supra*, 8 Cal.4th at pp. 750, 759-761, 763-764; *Ramirez, supra*, 143 Cal.App.4th at p. 1522.) Accordingly, the first purpose for which the trial court instructed the jury it could consider I.’s extra-judicial statements was proper. (*Ibid.*) But the second and third purposes for which the trial court instructed the jury it could consider I.’s extra-judicial statements exceeded the limited purposes for which fresh complaint evidence may be used. (*Ibid.*)

Nevertheless, defendant did not object to the error on the grounds he now asserts. Defendant fails to demonstrate that an objection on the grounds he now asserts would have been futile.

However, failure to object to instructional error does not result in forfeiture if the error affected the defendant’s substantial rights. (§ 1259; *People v. Lawrence* (2009) 177 Cal.App.4th 547, 553, fn. 11.) Substantial rights are affected if it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) Here, it is not reasonably probable defendant would

have achieved a more favorable result if the trial court had not given the challenged jury instruction.

Defendant does not challenge his count three conviction for possession of child pornography. With regard to the act required for the count one conviction, defendant admitted he cuddled and wrestled with I. He said maybe he “brushed up against something” and “something might’ve happened” when he played with her. The trial court instructed the jury that it may not consider I.’s statements for the truth. In other words, the jury could not use I.’s statements as evidence that defendant touched I.’s vagina and bottom. We presume the jury followed the trial court’s instructions.

(See generally, *People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Washington* (2017) 15 Cal.App.5th 19, 26; *People v. Williams* (2009) 170 Cal.App.4th 587, 607.)

During his closing argument, defendant’s trial counsel reminded the jury that it could not use Mary’s testimony about I.’s extra-judicial statements to conclude that defendant touched I. Defendant’s trial counsel argued there was no evidence of touching. He urged the jury not to believe Mary’s testimony that I. referenced such touching. In discussing the element of touching during her closing argument, the prosecutor did not refer to I.’s extra-judicial statements.

With regard to the requisite intent, defendant admitted he was sexually attracted to young girls. Moreover, he said he got an erection or was “turned on” while cuddling or wrestling with I. Defendant said he got an erection while wrestling with I. a handful of times and admitted that child pornography helped alleviate his desire when he had thoughts about kids. Defendant possessed hundreds of images of child pornography. And he had a photograph of I. posed in a manner similar to subjects in his child pornography collection. Although defendant played with both I. and J., he favored I.

Because the instructional error did not affect defendant’s substantial rights, he forfeited his instructional challenge.

DISPOSITION

The judgment is affirmed.

/S/
MAURO, J.

We concur:

/S/
HULL, Acting P. J.

/S/
DUARTE, J.